STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2002
V	No. 228727 Saginaw Circuit Court
MICHAEL ANTHONY MITCHELL, Defendant-Appellant.	LC No. 98-015508-FH

Before: Kelly, P.J. and Saad and Smolenski, JJ.

PER CURIAM.

After a second trial, defendant was convicted by a jury of possession with intent to deliver 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii).[1] He was sentenced to 32 to 50 years imprisonment as a fourth habitual offender, MCL 769.12. Defendant appeals as of right. We reverse.

I. Basic Facts and Procedural History

Officers Diane Meehleder and Lerone Clement effectuated a traffic stop of defendant for improper lane usage. Defendant was loud and argumentative and stated that it was another vehicle of the same color that committed the civil infraction. He was sweating profusely despite the cold weather and was moving nervously in the vehicle. Concerned about defendant's movements and attitude, Clement asked him to put the vehicle in park and requested permission to search defendant and the vehicle for weapons. Instead of complying, defendant drove suddenly from the scene, at a high rate of speed.

The officers initially lost sight of the vehicle. However, as the officers began pursuit, they regained visual contact. Defendant was observed proceeding eastbound on Simoneau Street three-quarters of a block ahead of the officers. He was driving in the middle of the two-way street, going from the westbound lane into the eastbound lane. Continuing at a high rate of speed, defendant's vehicle pulled two blocks ahead of the patrol car and the officers again lost

[1] An earlier trial had resulted in a hung jury with respect to the cocaine charge. However, that earlier jury found defendant guilty of fleeing and eluding a police officer, MCL 750.479a (an alternative count to resisting and obstructing an officer, MCL 750.479b), for which defendant was sentenced to one year of probation.

visual contact. At no point during the chase did either officer see anything thrown from defendant's vehicle, nor did any citizen report seeing any items discarded by defendant.

The officers eventually found defendant's vehicle near a high chain-link fence. Defendant was not in his vehicle or anywhere within sight. With direction from residents, Clement subsequently located defendant and took him into custody without resistance. The officers searched defendant and discovered $100 in currency in his wallet. A search of the vehicle failed to produce any drugs or other contraband.

While backtracking the route of the foot pursuit, Clement found $480 on the ground on the opposite side of the fence from defendant's vehicle. Clement and Meehleder then retraced on foot the route of the vehicle pursuit of defendant. Approximately one and a half hours after the initial stop, Meehleder picked up a baggie in the grass near the sidewalk in the middle of the block on Simoneau, containing pieces of what she at first thought to be soap, but then realized was probably evidence. When Clement approached, he ordered Meehleder to put the baggie down as she found it in order to preserve it for fingerprinting. Clement observed muddy tire tracks close to the curb near the drugs on the north side of Simoneau that led back into the eastbound lane. Meehleder stated that when she found the baggie, it was dry, although the ground beneath was wet.[2]

Photos of the scene were taken and the suspected cocaine was taken into evidence. No drug-sniffing canine was utilized to check for drug scents on either the currency seized from defendant or his vehicle, nor were photos or measurements taken of tire tracks near the location where the drugs were found. A laboratory analysis confirmed the baggie contained 112.7 grams of cocaine. No fingerprints were found on the baggie. A search warrant executed at defendant's residence produced no evidence of drugs or drug activity.[3]

Defendant's testimony from his first trial was read into the record. Defendant testified that the reason he bolted from officers Clement and Meehleder was that he feared they were going to put him in jail because he was behind in child support payments. Defendant testified that after fleeing from the site of the traffic stop, he made his way to his aunt's house at 714 Thompson Street, the location where he abandoned his vehicle and continued his escape on foot. While climbing the fence, he dropped the money that police later found. Defendant stated he was given $500 by Gene Mixon, the owner of Mixon's Service, to pay Mixon's Consumers Power bill for him. Asked on cross-examination about the discrepancy because police only found $480 at the base of the fence, Defendant said the remaining $20 must have fallen out at some point while he was running through "a lot of yards."

Gene Mixon, sole proprietor of Mixon's Service, testified that defendant was not an employee but that he rented defendant space in his garage to detail cars, and they would split the profits. He called their association a "partnership," and said he did not pay taxes on what he paid defendant. Mixon stated he gave defendant $500 to pay his Consumers Energy bill and that he

---

[2] When the officers had begun their shift at noon, it had been raining; however it was not raining during the stop, pursuit, or investigation of defendant.

[3] Firearms were seized, which were later returned when found to be registered and legal.

has asked others to pay his bills for him in the past. Mixon's Consumers Energy billing dated February 11, 1998, was $994.33.

Mixon said he received a telephone call from defendant, who told him the police had stopped him, he was in jail, and that he would see Mixon when he got out. Defendant did not tell Mixon why he was in jail or elaborate further. Defendant did not tell Mixon what happened to his money until after he was out of jail and spoke to Mixon in person. Mixon testified that when he spoke to defendant in person, defendant, "said they stopped him and said that he had drugs, but you know, he said [sic] didn't have no drugs." Mixon said defendant did not tell him why he was running from the police, and he claimed he did not ask defendant because, "I never ask nobody their private business like that." Mixon testified that defendant never told him he had drugs on him the day he was paying his bill and that he never saw defendant involved in any apparent drug activity

Officer Clement testified that he interviewed Mixon on April 27, 1999 regarding defendant, and that Mixon's answers changed throughout the conversation. Clement stated that initially, Mixon said he had given defendant the $500 the morning of the day defendant was arrested. Then, Mixon recanted and said he gave defendant the money the night before he was arrested. Clement said Mixon also gave conflicting answers regarding whether defendant was working for him. Clement testified that when he asked Mixon whether defendant had contacted him on his arrest, Mixon said defendant had done so and had told him that "he had been caught with drugs." Asked if Mixon had indicated a willingness to testify in the case, Clement stated, ". . .[H]e told me that he was going to say that he didn't know anything about it. He did not want to be involved with the case, and that he was not going to be a part of it." Following a double hearsay objection by defense counsel at trial, the trial judge gave a limiting instruction on the statement to the jury, in which she directed that it only be used in weighing Mixon's credibility, not in deciding whether the elements of the crime were proven. During closing arguments, the prosecutor referred to the statement:

> "I asked him specifically, did you tell Detective Clement that what the phone call really said was Mitchell informed him he'd been caught with drugs and that he was in jail? Now, is that important? I think it is.
>
> Mitchell calls Mixon and says I'm caught with drugs and that's why I'm in jail versus I'm caught and they've got your Consumers Power money. Mr. Mixon denied that to you. Officer Clement testified it was said. The judge will give you an instruction on inconsistent statements, and you will have to decide did Mixon say that to Detective Clement? Was he telling you the truth when he came in here today?"

The jury convicted defendant as charged and defendant appeals as of right.

II. Sufficiency of Evidence

Defendant first argues that the evidence was insufficient to establish a nexus between defendant and the cocaine. On this record, we are compelled to agree. This Court reviews a

defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001).

The elements of the charge of possession with intent to deliver cocaine are: "(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998), MCL 333.7401(2)(a)(iii). Defendant argues that the prosecution failed to prove the first element of the offense: that defendant knowingly possessed the cocaine that the police found.

"A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive." *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). When determining whether the defendant constructively possessed the controlled substance, "the essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "A person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown." *Wolfe*, *supra*, 440 Mich 520. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id*. at 521. "Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession. *People v Sammons*, 191 Mich App 351, 371; 478 NW2d 748, lv den 439 Mich 938, cert den 505 US 1213; 112 S Ct 3015; 120 L Ed 2d 888 (1992).

It is not contested that defendant's route during his flight from police took him directly past the location where the cocaine was found. When officers regained visual contact with defendant's vehicle, it was three-quarters of the way up the block, returning to the correct lane of traffic (eastbound) from the wrong lane (westbound). Approximately ninety minutes after defendant passed the location, the drugs were found mid-block on the north side of the street, between the sidewalk and a fence. A police officer testified he saw muddy tire tracks swerving up on the curb near where the drugs were, although no photos or measurements were taken. Defendant's driver's side window had been down when he fled the traffic stop and he testified that the window stayed down during the pursuit. At no point during the chase did either pursuing officer see anything thrown from defendant's vehicle, nor did any citizen report seeing any items discarded by defendant. No fingerprints were found on the baggie containing the drugs and no contraband was discovered on defendant, in his vehicle, or at his home.

On this record, we cannot find a connection was established between defendant and the cocaine to create a sufficient nexus for constructive possession. The only potential link between defendant and the drugs, other than defendant's earlier proximity to the spot where the drugs were found, was his business partner's alleged statement to a police officer that defendant had called him from jail and said he had been caught with drugs. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). Viewed in a light most

favorable to the prosecution, defendant's alleged statement to his partner amounted to an admission that he had the drugs in his possession when originally stopped by police.

However, following a double hearsay objection by defense counsel at trial, the trial judge gave a limiting instruction on the statement to the jury, in which she directed that it only be used in weighing defendant's business partner's credibility, not in deciding whether the elements of the crime were proven. Without substantive use of the statement, the prosecution merely established that defendant drove past the location approximately ninety minutes before the drugs were discovered. This is insufficient to establish constructive possession under *Wolfe*, *supra*. For this reason, it was error requiring reversal for the jury to have found the possession element proved and defendant guilty beyond a reasonable doubt of possession with intent to deliver 50 to 224 grams of cocaine.

In light of our holding on this issue, we do not consider defendant's other arguments on appeal.

Reversed.

/s/ Kirsten Frank Kelly
/s/ Henry W. Saad
/s/ Michael R. Smolenski